FILED
MAR 27 1950
CHARLES ELMORE CROPLE
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 705

HELEN K. HENJES AND EDMUND F. BOWEN, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF GERD H. HENJES, DECEASED, AND HENJES MARINE, INC., A CORPORATION, *Petitioners,*

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The petitioners, Helen K. Henjes and Edmund F. Bowen, executors of the last will and testament of Gerd H. Henjes, deceased, and Henjes Marine, Inc., pray that a Writ of Certiorari issue to review the judgment of the Court of Claims entered in the above entitled case on January 3, 1950.

Opinion Below

The opinion of the Court of Claims (R. 18-31) is reported in 87 F. Supp. 780.

Jurisdiction

The judgment of the Court of Claims was entered on January 3, 1950 (R. 32). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1255 (Sec. 3 (b) of the act of February 13, 1925, as amended).

Statement

This is a suit to recover just compensation for the taking by the United States of title to and possession of the diesel tug ROBERT HENJES on August 1, 1942. The tug ROBERT HENJES was owned by Gerd H. Henjes, deceased, who was also the owner of all the capital stock of Henjes Marine, Inc., a New York corporation (R. 19). Prior to February 25, 1942, the ROBERT HENJES was operated by Henjes Marine, acting as the agent of Gerd H. Henjes (R. 20).

On February 25, 1942, the tug was delivered to contractors performing work for the Navy Department at Floyd Bennett Field, Brooklyn, New York (R. 20). These contractors, White Construction Co., Inc., Underpinning & Foundation Co., Inc. and Riggs, Distler & Co., Inc., had, on December 17, 1941, entered into a cost-plus-a-fixed-fee contract with the United States, acting through the Chief of the Bureau of Yards and Docks of the Navy Department, for the expansion of facilities at the Naval Air Station, Floyd Bennett Field, New York. The contract is known as Navy Contract NOy-5176 (R. 20). This contract recited that the parties thereto, being the United States of America and the said contractors, "with the intent and purpose to accomplish certain projects hereinafter mentioned within the shortest practicable time by cooperative effort * * * do mutually agree as follows" (R. 12). The contract provided that the work in the field on behalf of the government should be in charge of an officer designated

by the Contracting Officer, and that no equipment costing in excess of $200.00 should be purchased by the Contractors and that no equipment should be leased by them at a rental of more than $100.00 a month except by approval in writing of the Contracting Officer or his representative. This contract remained in full force and effect during all of the times herein involved (R. 20).

This contract also provided that in addition to the fixed fee to be paid to the contractors, the contractors should be paid the actual net cost of the materials actually furnished and the services and labor actually performed under the terms of the contract (R. 14-15); it being stated to be the intent of the contract that the contractors shall be reimbursed for all out-of-pocket expenditures made by the contractors for or on account of the contract "which are specifically or impliedly authorized, sanctioned or approved by the Contracting Officer or by his direction," and that "actual net cost" will include "the amount of rental approved by the Contracting Officer for plant and equipment owned or procured by the Contractors" under the provisions of the contract, "for use in connection with the work" under the contract (R. 15).

On March 11, 1942, the contractors, with the written approval of the officer-in-charge under Navy Contract NOy-5176, entered into a written contract with Henjes Marine, Inc. for the charter or lease of the tug ROBERT HENJES at the rent of $100.00 per 24-hour day. This charter was on a bare-boat basis under which the contractors agreed to furnish the crew and pay all other expenses of operation. There was no specified term in the lease and the contractors reserved the right to terminate the lease at any time that it appeared to the Government's advantage to do so. However, it was further specifically provided that unless the title to the equipment passed to the

Government at an earlier date, the rental period would terminate when the equipment was removed from the site of the work, provided this was done within a reasonable time after notice from the contractors or the officer-in-charge that the equipment was no longer required (R. 21). There was contained in the charter agreement a specific provision requiring the lessor to deliver title to the equipment to the Government when and if the total rental paid for the equipment should equal the valuation thereof plus 1% per month for each month or fraction thereof such piece of equipment had been in use, and whereby upon completion of the work performed by any piece of equipment under Navy Contract NOy-5176 or upon termination of the charter, as otherwise provided in the charter, the Government might, at its option, purchase any piece of equipment by paying to the lessor the difference between the valuation thereof plus 1% per month for each month or fraction thereof such piece of equipment had been in use, and the total rentals which had been paid for such piece of equipment. By the charter agreement, the tug was appraised at $100,000.00 (R. 21).

While the tug ROBERT HENJES was working under this charter agreement upon the expansion of the facilities at Floyd Bennett Field under Navy Contract NOy-5176, on July 20, 1942, a Procurement Officer of the Navy Department requested the War Shipping Administration to requisition title to the tug. The request was made, as stated therein, "by the Naval Air Station, Floyd Bennett Field, New York. Tug to be acquired by the Navy and turned over to Officer-in-Charge, Contract No. NOy-5176, Naval Air Station, Floyd Bennett Field, New York, *for further transfer to the contractor under charter agreement*" (R. 22). In accordance with this request on August 1, 1942, the War Shipping Administration acting pursuant to Section

902 of the Merchant Marine Act of 1936, requisitioned title to and possession of the tug ROBERT HENJES together with all her tackle, apparel, spare parts, gear and equipment, stores and supplies on board, and simultaneously delivered the vessel at its then location at Floyd Bennett Field to the Navy Department, and the vessel was thereafter continued in use for the expansion of the facilities at Floyd Bennett Field under Navy Contract NOy-5176 to and including January 23, 1943 (R. 22). No notice had been given by the contractors or by the officer-in-charge under Navy Contract NOy-5176 terminating the charter or requesting the removal of the tug from the site of the work.

If the ROBERT HENJES had not been requisitioned on August 1, 1942, the plaintiff, Henjes Marine, Inc. would have earned bare-boat rental amounting to $15,100.00 for the continued use of the tug on the expansion of facilities at Floyd Bennett Field under Navy Contract NOy-5176 up until January 23, 1943 (R. 25).

If the Government on August 1, 1942, exercised the option to purchase the tug granted it by Article VII of the charter agreement, the price which it would be required to pay is $91,900 (R. 25).

On October 5, 1942, the War Shipping Administration wrote Gerd H. Henjes advising that it had appraised the tug at the sum of $51,781.00 and offered him that amount as just compensation for the vessel (R. 23). This offer was declined, whereupon the Government advised Mr. Henjes that he had the privilege of accepting 75% of that amount and suing the United States to recover such additional sum as would be just compensation. After considerable correspondence between the parties, during which Mr. Henjes insisted upon his right to recover compensation in accordance with the terms of the charter agreement, an arrange-

ment was worked out whereby Mr. Henjes was paid the sum of $38,835.75, being 75% of $51,781.00, reserving to him the right to sue the United States for such additional sum as "will make up such amount as will be just compensation for the vessel as provided by the Constitution and Laws of the United States" (R. 24). Immediately thereafter, Henjes Marine instituted suit in the Supreme Court of the State of New York against White Construction Co., Inc., Underpinning & Foundation Co., Inc., and Riggs, Distler & Company, Inc., the contractors under Navy Contract NOy-5176, to recover the amount of $15,100 for the use of the tug from August 1, 1942 to January 23, 1943, in accordance with the terms of the charter agreement of March 11, 1942. The contractors were defended in that action by the United States Attorney, and after a trial of the issues by the Court without a jury, a judgment was entered dismissing the complaint on the ground that the taking of the vessel by the Government effectuated a frustration of the contract between Henjes Marine and the said contractors (R. 24-25). The present action followed.

In the present action, the plaintiffs have contended that they were entitled to be paid as just compensation the amount which the Government would have been required to pay for the tug ROBERT HENJES as upon the exercise of the option to purchase under Article VII of the charter agreement, $91,900.00, less the prior payment of $38,835.75; alternatively that they should be paid as part of just compensation, in addition to the value of the tug, determined *aliunde* the charter agreement, the sum of $15,100.00—the value of the bare-boat charter hire which would have been earned by the tug under the charter agreement until the completion of her work at Floyd Bennett Field under Navy Contract NOy-5176, had not the tug been requisitioned on August 1, 1942 (R. 29-30).

The Court of Claims rejected both these contentions (R. 30) and held that the value of the ROBERT HENJES on the date of requisition, exclusive of any enhancement in value due to the causes necessitating the taking, was $60,000.00 (R. 27). Judgment was entered accordingly (R. 32).

Statutes Involved

The pertinent portions of the Merchant Marine Act, 1936, as amended, 46 U. S. C. 1242, are set forth in an appendix hereto, pu. 24-25.

Contract Provisions Involved

The applicable articles of the charter agreement between the Henjes Marine, Inc. and the Navy contractors covering the tug ROBERT HENJES provide as follows (R. 8-9):

ARTICLE IV

> The Lessor shall initiate shipment of the equipment to the site of the work immediately. It is estimated that the equipment will be used for approximately .... working hours, but the Lessee reserves the right to increase or decrease the rental period, or to terminate at any time that it appears to the Government's advantage to do so, and payment of rentals then due shall constitute payment in full.

ARTICLE V

> A. The Lessor shall be paid at the rate prescribed in Schedule "A" attached hereto and made a part hereof. The rental period shall begin on the delivery of such equipment to a common carrier for shipment to the site of the work, as evidenced by bill of lading covering such shipment or other evidence satisfactory to the Officer-in-Charge, and shall terminate, unless title to the equipment passes to the Government at an earlier date, on the date of removal of such equipment from the site of the work, as evidenced by a receipt signed by the Lessor, provided such equipment is re-

moved within a reasonable length of time after notice by the Lessee or the Officer-in-Charge to the Lessor that such equipment is no longer required. If the equipment is not removed within a reasonable length of time, the rental shall terminate on the date of the notice that such equipment is no longer required. * * *

ARTICLE VII

The Lessor shall deliver to the Government title to any piece of equipment free of all liens and encumbrances when and if the total rental paid to the Lessor for such piece of equipment shall equal the valuation thereof, plus one percent per month for each month or fraction thereof such piece of equipment has been in use, and at the completion of the work performed (by any piece of equipment) under the principal Contract or upon termination of the contract as provided in Article VI, the Government may at its option purchase any piece of equipment by paying to the Lessor the difference between the valuation of such piece of equipment plus one percent per month for each month or fraction thereof such piece of equipment has been in use and the total rentals theretofore paid for such piece of equipment, provided that if such payment is made by the Government, the Lessor shall deliver to the Government title to such piece of equipment free of all liens and encumbrances.

Questions Presented

1. Where the United States takes property, which has been leased to a contractor employed by the Government to perform by cooperative effort with a department of the Government work authorized by Congressional appropriation, for the express purpose on the part of the United States of re-leasing the property to the contractor for use in the performance of the authorized work, must not the United States pay as the "just compensation" required by the Fifth Amendment, damages of appropriation for

the taking of the lease in addition to the value of the property taken?

2. Where the United States, in the exercise of its paramount powers, takes property which it has an existing option to purchase at a stipulated price, is not the price stated in the option agreement the measure of just compensation under the Fifth Amendment?

Reasons for Granting the Writ

1. What was here taken was not merely the tug ROBERT HENJES but the contract with the contractors under Navy Contract NOy-5176. The tug ROBERT HENJES was requisitioned at the specific request of the Navy Department for the express purpose of being simultaneously transferred to the Navy and turned over to the officer-in-charge under Navy Contract NOy-5176 "for further transfer to the contractor under charter agreement" (R. 22). Such a transfer to another department of the Government is specifically authorized by Sec. 902 (e) of the Merchant Marine Act (Appendix, p. 24, *infra*). The tug actually continued to be employed in connection with the expansion of the facilities at Floyd Bennett Field under Navy Contract NOy-5176 to and including January 23, 1943 (R. 22). In holding that under such circumstances the damages which plaintiff suffered by the loss of charter hire which it otherwise would have earned "were damages of frustration and not of appropriation, and are not compensable," the decision of the Court of Claims is in conflict with the decisions of this Court in *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; *Long Island Water Supply Co.* v. *City of Brooklyn,* 166 U. S. 685; and *Lynch* v. *United States,* 292 U. S. 571. The decision of the Court of Claims is also in conflict with the rationale of this Court's recent decision

in *Kimball Laundry Company* v. *United States* decided June 27, 1949, 93 (No. 17) L. Ed. Adv. Op. 1420.

In the *Brooks-Scanlon* case, the Government requisitioned a number of ships under construction in the shipyard of New York Shipbuilding Corporation, among which was a hull known as #193 which the shipbuilding corporation was under contract to construct for the claimant. The requisition order required the shipyard to complete construction for the Government, and the Government subsequently entered into a contract with the shipyard for the completion and disposal of the said hull. The Fleet Corporation awarded the claimant as just compensation the amount of payments previously made to the shipbuilder and the Court of Claims slightly increased the award following, however, the same method of ascertaining just compensation. This Court held that by the taking of the uncompleted hull and entering into a contract with the shipbuilder to complete the hull in accordance with the claimant's contract with some modifications, the Government expropriated the claimant's contract and that the claimant was entitled to be compensated for the value of his contract and not merely for the monies which he had expended and the plans and specifications which had been taken over by the Government, saying (265 U. S. 120):

> "The contract was not terminated. The direct and immediate result of the requisition orders and acts of the Fleet Corporation was to take from claimant its contract and its rights thereunder."

and further (at P. 121):

> "It must be held that the claimant's contract and its rights and interests thereunder, were expropriated."

The Court of Claims in the present case cited for its ruling that the damages sustained by petitioner were dam-

ages of frustration and not of appropriation, the decision of this Court in *Omnia Commercial Company* v. *United States,* 261 U. S. 502. In that case it was not the claimant's contract which was appropriated but the product of a steel mill not owned by the claimant. The facts were that claimant had made a contract with a steel mill for its entire output but while the contract was still entirely executory, no steel having been delivered, none having been appropriated to the contract and no part of the purchase price having been paid, the Government requisitioned the steel company's entire production. The requisition was made not for the purpose of completing or performing the steel mill's contract with the claimant but for other use. Recovery was denied to the claimant in that case because nothing belonging to the claimant had been taken. The distinction between the *Omnia* case and the present one is well pointed out in the decision of this Court in the *Brooks-Scanlon* case at 265 U. S. 120, 121.

Moreover, the *Omnia* case itself specifically recognizes the obligation of the Government to make compensation for the taking of a contract as well as any other property for public use, saying (261 U. S. 510):

> "If, under any power, a contract or other property is *taken* for public use, the government is liable; but if injured or destroyed by lawful action, without a taking, the government is not liable."

In the present case the Government took plaintiff's contract with the Navy contractors just as truly as it took the claimant's contract in the *Brooks-Scanlon* case.

That mere compensation for the physical value of the thing taken is not the measure of just compensation, where by the taking the owner is deprived of and the Government acquires rights of value in addition to the thing itself, is firmly established by the decisions of this Court in *Monon-*

gahela v. *United States,* 148 U. S. 312, and *Long Island Water Supply Co.* v. *City of Brooklyn,* 166 U. S. 685.

In the *Monongahela* case, the United States, by condemnation proceedings, appropriated a lock and dam of the Monongahela Navigation Company located on the Monongahela River near Pittsburgh, Pennsylvania. The Act of Congress pursuant to which the appropriation was made provided, "That in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated" (148 U. S. 313). An award was made to the plaintiff in the condemnation proceeding pursuant to the proviso of the said Act in the amount of $209,000.00 "not considering or estimating in this decree the franchise of this company to collect tolls" (p. 319).

This Court held that it was not "concluded by the declaration in the Act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property" (p. 328); and held that the Government was required to pay as just compensation under the Fifth Amendment, not merely the value of the physical property taken but also the value of the franchise to collect tolls; saying (p. 341):

> "The theory of the government seems to be, that the right of the Navigation Company to have its property in the river, and the franchises given by the state to take tolls for the use thereof, are conditional only, and that whenever the government in the exercise of its supreme power assumes control of the river, it destroys both the right of the company to have its property there, and the franchise to take tolls. But this is a misconception. The franchise is a vested right. The state has power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though a superior, power exists in the national government. It may take it for public purposes, and take it even against

> the will of the state; but it can no more take the franchise which the state has given than it can any private property belonging to an individual."

and further (p. 343):

> "It is also suggested that the government does not take this franchise; that it does not need any authority from the state for the exaction of tolls, if it desires to exact them; that it only appropriates the tangible property, and then either makes the use of it free to all, or exacts such tolls as it sees fit, or transfers the property to a new corporation of its own creation, with such a franchise to take tolls as it chooses to give. But this franchise goes with the property; and the Navigation Company, which owned it, is deprived of it. The government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived."

In the *Long Island Water Supply* case, the City of Brooklyn pursuant to statutory authority condemned the physical properties and franchise of the Water Supply Company, which at the time had a contract with the City as the successor to the town of New Lots, for the providing of water for which it was paid a fixed fee for each hydrant. The condemnation was opposed by the Water Supply Company on the ground that the legislative act authorizing the condemnation was a law impairing the obligations of contract. In affirming the decision of the New York Court of Appeals upholding the condemnation, this Court said (166 U. S. 690):

> "Second, a contract is property, and, like any other property, may be taken under condemnation proceed-

> ings for public use. *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Manufacturing Co.*, 115 U. S. 650, 673. Its condemnation is of course subject to the rule of just compensation * * *."

Similarly in the instant case the plaintiff had a subsisting contract whereby it was to receive a fixed bare-boat charter rental per day for the use of its tug on a government project which was in process but far from completion. The plaintiff had a continuing right to receive such bare-boat charter hire as long as the tug continued to be employed on the project. The Government took the tug and with it, the right to collect charter hire for the use of the tug while it continued to be employed on the project; for it took the tug for the express purpose of continuing it under charter to the contractors. If the taking in the instant case were for a public use not related to the project upon which the tug was then employed, a different problem would be presented. The owner of the tug could conceivably carry on his business with the contractor by substituting an equivalent tug to perform the contract. But here he was deprived of that opportunity; for it was not only his tug but also his contract which was taken. The situation is analogous to that existing where the Government condemns business property with the intention of carrying on the business where, as noted by this Court in its recent decision in *Kimball Laundry Company* v. *United States, supra,* the taker is obligated to pay not merely for the value of the physical property taken but also for the going-concern value. As this Court also noted in the *Kimball Laundry* case, where the owner is allowed no more for the taking of fee title to business property than the value of the physical property, it is upon the justification that the going-concern value has not been taken because the owner is left free to move his business to a new location. Although in the *Kimball Laundry* case there was not a taking of fee

title but merely a taking of temporary use, the rationale upon which this Court proceeded in holding that "since the Government for the period of its occupancy of petitioner's plant has for all practical purposes preempted the trade routes, it must pay compensation for whatever transferable value their temporary use may have had," is equally applicable here. The rationale of that case is that an "exercise of the power of eminent domain which has the inevitable effect of depriving the owner of the going-concern value of his business is a compensable 'taking' of property." The tug ROBERT HENJES in the instant case was a business property having a going-concern value in the sense that at the time of the taking it had a subsisting earning capacity, free and clear of expenses, of $100.00 per day. That going-concern value was taken by the Government in the instant case just as much as the *res* itself, since by the taking under the circumstances here present the owner was deprived of the opportunity of substituting other property (the equivalent of moving his business to a new location) to continue to realize the going-concern value of his business.

In denying the plaintiffs below any recovery for the loss of rental or lease monies which they sustained, the Court of Claims points to the fact that the charter agreement was for an indefinite term and stipulated that it could be terminated at any time it appeared to the Government's advantage to do so (R. 30). The termination, however, which was envisaged by the contract was a termination by return of the equipment to the owner (Article V of the Charter Agreement, R. 8); it was not a termination by the taking of title to the equipment unless title were taken pursuant to the option provided for in Article VII (R. 9). To treat the taking of the title to the tug, unless the Government thereby exercised its purchase option, as

a termination of the charter contract in accordance with its terms, is to prefer the form to the substance.

As this Court said respecting the Fifth Amendment, writing by Mr. Justice Brewer in *Monongahela* v. *United States* (148 U. S. 312, 325):

> "And with respect to constitutional provisions of this nature it was well said by Mr. Justice Bradley, speaking for the court, in *Boyd* v. *United States,* 116 U. S. 616, 635, 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*'."

Rights against the United States, arising out of contract, have the same constitutional protection under the Fifth Amendment as other contracts. Said this Court in *Lynch* v. *United States,* 292 U. S. 571, 579:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States* v. *Central P. R. Co.,* 118 U. S. 235, 238, 30 L. ed. 173, 174, 6 S. Ct. 1038; *United States* v. *Northern P. R. Co.,* 256 U. S. 51, 64, 67, 65 L. ed. 825, 828, 830, 41 S. Ct. 439."

2. The decision of the Court of Claims in rejecting petitioners' claim to the option price of the tug as stipulated

in the charter agreement or lease, is in direct conflict with the decision of this Court in *Muschany* v. *United States,* 324 U. S. 49.

The Court of Claims has attempted to distinguish the *Muschany* case from the present one on the ground that in the *Muschany* case the contract was directly with the Government and stipulated that if condemnation was resorted to, the option price should measure the land owner's compensation, while there is no such obligation found in the instant case (R. 30). Petitioners urge that the attempted distinction is invalid.

The contract for the leasing by the Navy Contractors of the tug ROBERT HENJES, entered into with the authorization and approval of the contracting officer of the Navy (R. 10), was as much a contract of the United States as if it had been made and entered into directly between the plaintiff and the Navy Department.

The charter party or lease of the tug ROBERT HENJES in the instant case could only be entered into by the contractors with the authorization and approval of the contracting officer of the Navy in charge (R. 12-13). The agreement, by its terms, was made subordinate to the principal contract (Navy Contract NOy-5176), and it was entered into for the use and benefit of the United States (R. 7). It was terminable when it appeared to the advantage of the Government to terminate it (R. 8) and it contained an express provision binding the owner to convey title to the United States upon the fulfillment of certain conditions, and gave the United States the opinion to purchase for a stipulated price (R. 9).

The contract in the *Muschany* case, as will be observed by reference to that contract (pp. 342-4 of the Record in the *Muschany* case, Nos. 31 & 32, Oct. Term 1944) was no more a direct contract with the United States than was the charter agreement in the instant case in respect of the option agreement. The option contract in the *Muschany*

case was negotiated by a real estate broker, appointed by the United States but to be compensated by the land owner, and the only action taken by the United States in respect of the contract was the mere marking of the option agreement "accepted" by an officer in the War Department (se foot note 1 at 324 U. S. 70).

The charter agreement in the instant case was both authorized and approved by the Navy officer-in-charge under the principal contract (Navy Contract NOy-5176), and by the principal Contract the Government obligated itself to reimburse the contractors for the hire paid for the tug (R. 15).

The statement by the Court of Claims in its opinion that the option in the *Muschany* case "stipulated that if condemnation were resorted to, the option price should measure the landowner's compensation" (R. 30), is not entirely accurate. The provision respecting resort to condemnation in the option in the *Muschany* case read as follows: (Muschany Record, p. 344, Fol. 495; Nos. 31 & 32, Oct. Term 1944):

> "If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings."

Thus the condemnation proceeding stipulated for in the option was a consent proceeding designed to clear title. The condemnation proceeding actually instituted by the

Government in the *Muschany* case was not instituted under or pursuant to the option but was instituted without regard thereto, and the Government's position in the said proceeding was that it was not bound thereby. The fact that the option in the *Muschany* case provided a means of clearing title by the institution of consent condemnation proceedings; whereas the option in the present case merely imposed upon the owner the obligation of giving a clean title, affords no distinction in principle between the two option contracts. Resort to requisition by the War Shipping Administrator under Sec. 902 of the Merchant Marine Act for acquisition by the Navy, which is authorized by Sec. 902 (e), was as much an exercise of the option to purchase in the instant case as the resort to condemnation in the *Muschany* case; or conversely, the taking of title in the one case by requisition under Section 902 of the Merchant Marine Act and in the other case by the declaration of taking without regard to the option agreement, were each equally an attempted repudiation of a valid existing contract.

Section 902 (a) of the Merchant Marine Act under which the taking was effected here, provides: "When any such property * * * is so requisitioned, the owner thereof shall be paid just compensation for the property taken * * *." Just compensation for the property taken where there is an existing option to purchase for a stipulated price is, it is urged, the price so stipulated as much where the taking involves a vessel requisitioned under Section 902 of the Merchant Marine Act, as it is the stipulated price in the case of lands taken by condemnation proceedings.

3. The decision of the Court of Claims is in conflict with the well-established and traditionally respected principle, frequently emphasized by this Court, that the United States is bound by its private contracts to the same extent as

individuals and may not by the exercise of its paramount powers abrogate its contract obligations. *Cooke* v. *United States,* 91 U. S. (1 Otto) 389; *United States* v. *Bostwick,* 94 U. S. (4 Otto) 53; *Union Pacific Railroad Co.* v. *United States* (Sinking Fund Cases), 99 U. S. (9 Otto) 700; *Freund* v. *United States,* 260 U. S. 60; *Reading Steel Casting Co.* v. *United States,* 268 U. S. 186; *Lynch* v. *United States,* 292 U. S. 571.

Writing by Mr. Justice Butler, this Court said in the *Reading Steel Casting Co.* case (268 U. S. at p. 188):

> "The contract is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals. *Smoot's* Case, 15 Wall. 36, 47; *Amoskeag Mfg. Co.* v. *United States,* 17 Wall. 592, 595; *United States* v. *Smith,* 94 U. S. 214, 217."

and in the *Lynch* case (292 U. S. at p. 580) by Mr. Justice Brandeis:

> "But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.' Sinking Fund Cases, 99 U. S. 700, 719."

The tug Robert Henjes at the time of its requisition was under charter to contractors employed by the Navy Department to perform, by cooperative effort with the Navy Department, a public work authorized by Congress. The contract between the United States and the contractors forbade the contractors to purchase any equipment costing in excess of $200.00 or to lease any equipment at a rental

of more than $100.00 per month except after approval in writing by the contracting officer or his representative (R. 20). The contract for the charter or lease of the tug ROBERT HENJES was approved by the Navy officer-in-charge (R. 10) who by the terms of the construction contract, NOy-5176, was the representative of the contracting officer (R. 13). The contract for the charter of the tug was made by the contractors under and pursuant to the construction contract, NOy-5176 (R. 7) for the use and benefit of the United States in the performance of the authorized work. The United States obligated itself by the terms of the construction contract, NOy-5176, to pay the amount of the rental provided for in the charter (R. 15) and the charter agreement by its terms required the owner to convey title to the tug to the United States upon receipt by the owner of charter hire equivalent to the agreed valuation of the tug plus 1% per month and gave the United States an option to purchase the tug during or at the termination of the charter by paying the lessor the difference between the amount of rental theretofore paid and the value of the tug as stipulated in the charter agreement. It is urged by petitioners that this contract was a contract binding upon the United States, and upon the owner of the tug in favor of the United States, as much as if it had been entered into directly between the owner and the Navy Department without the intermediation of the contractors of the Navy Department. To permit the Government, under such circumstances, to take title to the tug by the exercise of the requisitioning power given to the Administrator of the War Shipping Administration under Section 902 (a) of the Merchant Marine Act of 1936 for transfer to the Navy Department and delivery by the Navy Department back to the Navy contractors, without requiring the Government to pay as just compensation either the option price or the value of the charter hire earned by the tug until the completion of its

work under Navy contract NOy-5176, is to sanction a repudiation by the United States of its contract obligations.

4. The questions presented are of general public importance.

In *United States* v. *Cors*, 69 S. Ct. 1086, this Court granted certiorari because of the importance of the decision "in the settlement of claims arising as a result of the requisitioning program during the period of recent hostilities." The present case presents another phase of the same problem.

Additionally, it presents the problem of the extent of the constitutional protection afforded the individual against the demands of the Government. As this Court said in *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 324:

> "The question presented is not whether the United States has the power to condemn and appropriate • • • for that is conceded, but how much it must pay as compensation therefor. Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance; for in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government."

The case also presents the problem of the validity of obligations assumed by the United States under a contract made by contractors employed by it, with its approval and for its benefit. As this Court said in *Muschany* v. *United States*, 324 U. S. 49, 66:

> "It is a matter of public importance that good faith contracts of the United States should not be lightly invalidated."

Conclusion

For the reasons stated, it is respectfully submitted that this petition should be granted.

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APPENDIX

The pertinent portions of the Merchant Marine Act, 1936 (Act of June 29, 1936, c. 858, Title IX, Sec. 902, 49 Stat. 2015) as amended August 7, 1939, c. 555 Sec. 3, 53 Stat. 1255, 46 U. S. C. 1242, provide as follows:

Sec. 902 (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.

* * * * * * *

(e). The Commission is authorized to repair, recondition, reconstruct, and operate, or charter for operation, any property acquired under authority of this section. The Commission is further authorized to transfer the possession or control of any such property to any department or agency of the Government of the United States upon such terms and conditions as may be approved by the President. In case of any such transfer the department or

agency to which the transfer is made shall promptly reimburse the Commission for its expenditures on account of just compensation, purchase price, repairs, reconditioning, reconstruction or charter hire for the property transferred. Such reimbursements shall be deposited in the construction fund established by section 206 of this Act.